79-1509

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1979

COMMITTEE TO PROTECT THE FIRST AMENDMENT RIGHTS OF EMPLOYEES OF THE DEPARTMENT OF AGRICULTURE,

Petitioner,

v.

BOB BERGLAND, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

COMMITTEE TO PROTECT THE FIRST AMENDMENT RIGHTS OF EMPLOYEES OF THE DEPARTMENT OF AGRICULTURE,
Petitioner,

v.

BOB BERGLAND, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Committee to Protect the First Amendment Rights of Employees of the Department of Agriculture, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit, not yet reported, is reproduced at Part D of the Appendix. The memorandum opin-

ion and order of the district court on remand is unpublished and is reproduced at Part C of the Appendix. The Judgment of the United States Court of Appeals for the D.C. Circuit remanding the case to the district court is unpublished and is reproduced at Part B of the Appendix. The Findings of Fact and Conclusions of Law of the district court granting respondent's motion for summary judgment, reported at 434 F. Supp. 314 is reproduced at Part A of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered December 27, 1979. App. 23a. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTION PRESENTED

Whether the circuit court and district court holdings have limited or misinterpreted *Elrod v. Burns,* 427 U.S. 347 (1976) by excluding State Directors of the Farmers Home Administration and State Executive Directors of the Agricultural Stabilization and Conservation Service whose positions have been defined by the Civil Service Commission as non-policy determining and non-confidential from the constitutional protections identified in *Elrod v. Burns.*

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

Petitioner's claim herein is based upon the First Amendment to the Constitution of the United States of America. The relevant provisions of Title 5 of the Code of Federal Regulations provide as follows:

"§6.2 *Schedules of excepted positions*

The Commission shall list positions that it excepts from the competitive service in Schedules A, B and C, which schedules shall constitute parts of this rule, as follows:

"Schedule A. Positions other than those of a confidential or policy-determining character for which it is not practicable to examine shall be listed in Schedule A.

Schedule B. Positions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination shall be listed in Schedule B. Appointments to these positions shall be subject to such non-competitive examination as may be prescribed by the Commission.

Schedule C. Positions of a confidential or policy-determining character shall be listed in Schedule C."

"Schedule A

§213.3101 Positions other than those of a confidential or policy-determining character for which it is not practicable to examine.

(a) The positions enumerated in §§213.3102 to 213.3199 are positions other than those of a confidential or policy-determining character for which it is not practicable to examine and which are excepted from the competitive service and constitute Schedule A."

§213.3113 Department of Agriculture.

(d) Agricultural Stabilization and Conservation Service. (1) Six positions of Regional Director at GS-14 and GS-15.

(2) Members of State Committees.

(3) State Executive Directors.

(e) Farmers Home Administration.
(1) State committeemen to consider, recommend, and advise with respect to the Farmers Home Administration program.
(2) County committeemen to consider, recommend, and advise with respect to the Farmers Home Administration program.
(3) Temporary positions whose principal duties involve the making and servicing of emergency loans pursuant to current statutes authorizing emergency loans. Appointments under this provision shall not exceed 1 year unless extended with the prior approval of the Commission for additional periods not to exceed 1 year each.
(4) State Directors and not to exceed three positions of State Director-at-Large."

STATEMENT

Petitioner is an *ad hoc* organization composed of former employees of the Department of Agriculture who occupied positions in the field service as either State Directors of the Farmers Home Administration (FmHA) or State Executive Directors of the Agricultural Stabilization and Conservation Service (ASCS). The United States Civil Service Commission (Commission) has excepted both positions from the competitive civil service

classifying them Schedule A.[1] The Schedule A positions are defined by the Commission as "positions other than those of a confidential or policy-determining character for which it is not practicable to examine . . ."[2]

On April 22 and April 25, 1977, the newly appointed Secretary of Agriculture discharged without cause a total of 9 FmHA State Directors and 17 ASCS State Executive Directors. The Committee brought this lawsuit in district court seeking injunctive relief claiming the Secretary was dismissing and threatening to dismiss its members from their positions for partisan political reasons and threatening to and had appointed political supporters of the Carter Administration to the positions previously occupied by its members in consideration of their political support.

The district court found that petitioner's members were fired for political reasons and considerations, stating that "these were patronage dismissals, pure and simple." Despite this finding, the district court nevertheless dismissed petitioner's complaint and upheld the dismissals relying primarily upon its conclusion that petitioner's members were policy making, confidential employees not within the ambit of this Court's decision in *Elrod v. Burns,* 427 U.S. 347 (1976).

Subsequently, two letters were sent from the Chairman of the Commission to the Secretary of Agriculture. On August 5, 1977, the Commission declined the Secretary's request to reclassify State Executive Directors of

---

[1] 5 CFR §§213.3101, 213.3113(d)(3) and (e)(4) (1978).

[2] 5 CFR §6.2 (1978); 5 CFR §213.3101 (1978). The same definition appears in the Commission's regulations pertaining to such posts in the Department of Agriculture. 5 CFR §213.3101 (1978).

ASCS from Schedule A to Schedule C.[3] It stated: "The Commission cannot conclude at this time that (State Executive Directors of ASCS) meet the Schedule C criteria for exception as policy-determining or confidential."

In a second letter, dated March 29, 1978, the Secretary restated his view that State Directors of ASCS should be converted from Schedule A to Schedule C and also stated his belief that FmHA State Directors "should be in the career service."[4]

The circuit court remanded the case to the district court for consideration of the March 29, 1978 letter. Upon remand, the district court considered both letters, finding that they "(did) not affect (its) previous determination" and granted summary judgment. Petitioner's appeal followed.

Although petitioner argued below that the Commission's regulations defining the Committee members' positions as non-policy determining and non-confidential, taken together with the letters of Messrs. Campbell and Bergland, conclusively established that the dismissals constitutionally were impermissible based upon the concurrence in *Elrod v. Burns,* 427 U.S. at 374-75 (Stewart, J. concurring), the circuit court affirmed the district court's conclusion that the positions occupied by the members of the Committee were policy making and therefore the discharge of the incumbents did not infringe upon their constitutional rights. In so doing, the court wholly ignored the contrary and long-

[3]The Chairman's letter is reproduced at page 4 of the D.C. Circuit's Opinion.

[4]The Secretary's letter is reproduced at page 5 of the D.C. Circuit's Opinion.

standing determination by the Civil Service Commission — the agency charged by Congress as having the expertise to make such determinations.

THE QUESTION PRESENTED AFFORDS THE COURT AN OPPORTUNITY TO CLARIFY THE DISTINCTION BETWEEN POLICY-MAKING AND NON-POLICY MAKING POSITIONS IN THE FEDERAL SECTOR FOR PURPOSES OF THE APPLICATION OF *ELROD V. BURNS*

The affirmance of the trial court's judgment guarantees widespread and unbridled patronage practices within the federal government. By ignoring the Commission's determination that petitioner's members occupied non-policy determining and non-confidential positions, the D.C. Circuit has virtually insured that political factors will control the selection of not only FmHA and ASCS state directors, but, as well, the selection of literally thousands of other federal employees classified by the Commission as Schedule A.[5] Furthermore and perhaps more importantly, the decisions below fatally erode an important and meaningful guideline that can be used to separate those jobs which legitimately are "political plums" from those which are not.

It is vital that the question presented herein be decided by this Court. The decisions below have a serious and devastating effect upon the proper operation of the patronage system in the federal sector. These decisions, if allowed to stand, insure that patronage will be practiced with abandon, bridled only by the judiciary on a

[5]Among others, attorneys in government service are classified as Schedule A (§213.3101 Federal Personnel Manual (July 31, 1978)). So also are law clerks and chaplains (Id.) and custodians, guards and laborers at the General Services Administration (5 CFR §213.3134(a)(1) (1978)).

case by case basis. Plainly, First Amendment rights may be protected in this manner, but only to the limited degree that individuals may (1) be able to recognize that their individual rights are being encroached upon and (2) to the extent that an individual may have the time and financial resources to prosecute those rights in the judicial system.

This case provides the Court a unique and important opportunity to provide guidance not only to literally thousands of individuals, but, as well, to the courts below. It affords the Court an opportunity to decide an important question of federal law which has not been, but should be, settled by this Court.

The plurality in *Elrod* recognized that "(n)o clear line can be drawn between policy making and non-policy making positions." 427 U.S. at 367. Moreover, as Judge Campbell, in his concurring opinion in *Illinois State Employees Union, Council 34, etc. v. Lewis,* stated:

> "It is simple enough to say that janitors, clerk-typists and elevator operators are 'non-policymaking' employees, but how far up in the bureaucratic echelon can a distinction be judicially drawn . . . The difficulty arises in attempting to fashion an appropriate and workable judicial standard for distinguishing between 'policymaking' and 'non-policymaking' positions." 473 F2d 561, 578 (1972), *cert.den.* 413 U.S. 928 (1973).

And the Harvard Law Review recently stated:

> "No clear line can be drawn between policymaking and non-policymaking positions. Elevator operators and janitors clearly fall within the court's proscription of patronage firings and department heads clearly do not; the applicability of the *Elrod* decision to the broad range of jobs in between these extremes remains to be resolved on a case by case basis." 90 Harvard Law Review 56, 194.

This case, however, presents the Court with an opportunity to clarify the line between policymaking and non-policymaking positions in the federal sector. Indeed, the line has already been drawn, for nearly 30 years, by the Civil Service Commission – the agency entrusted by Congress to make such determinations.

Strong discontent with the corruption and inefficiency of the patronage system during Andrew Jackson's Administration led Congress to enact the Pendleton Act,[6] the foundation of modern civil service. And, as stated by Justice Burger:

> "Congress long ago, as a matter of policy, opted for a federal career service with a small number of purely political appointments in the Executive Branch, and many governmental departments have a limited number of positions in which the persons appointed have no tenure but serve at the pleasure of the cabinet officer or agency chief, who in turn serves at the pleasure of the President. *See, e.g., Leonard v. Douglas,* 116 U.S.App.D.C. 136, 321 F2d 749 (1963). The considerations leading to these legislative conclusions are – for me – not open to judicial scrutiny under the guise of a First Amendment claim, any more than is the

[6]Act of Jan. 16, 1883, c.27 §2(2) 5-6, 22 Stat. 404.

> right of a newly elected Representative or Senator, for example, to have a staff made up of persons who share his political philosophy and affiliation and are loyal to him. It seems to me that the Illinois Legislature's choice is entitled to no less deference." *Elrod v. Burns,* 427 U.S. at 376 Burger, J. dissenting).

Similarly, petitioners urge that the determination of the Civil Service Commission respecting the non-policy determining, non-confidential nature of the positions involved herein is entitled to great deference.[7]

Accordingly, because the court below gave no deference to the long-standing classification by the Commission of the positions herein as non-policy determining and non-confidential, its holding is clearly erroneous under *Griggs v. Duke Power* and *Udall v. Tallman, supra,* and as such should not be allowed to stand.

[7] *Griggs v. Duke Power,* 401 U.S. 424 (1970); *United States v. Chicago,* 400 U.S. 8 (1970); *Udall v. Tallman,* 380 U.S. 1 (1965). Deference is even more clearly due because of the Commission's consistent reading of its regulation over a long period of time. See Bergland and Campbell letters, *supra. E.g., Committee for Open Media v. FCC,* 633 F2d 1 (D.C.Cir.1976).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March, 1980

APPENDIX A
Filed June 3, 1977
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE FOR PROTECTION OF FIRST AMENDMENT RIGHTS OF DEPARTMENT OF AGRICULTURE EMPLOYEES, Plaintiff,	)	
v.	)	Civil Action No. 77-0481
BOB BERGLAND, Secretary of Agriculture, et al., Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Introduction

Plaintiff, an *ad hoc* organization composed of past and present employees of the United States Department of Agriculture occupying positions in the field service entitled "state directors" of the Farmers Home Administration (FmHA) and "executive directors" of the Agricultural Stabilization and Conservation Service (ASCS), brought this action for declaratory and injunctive relief to enjoin the defendants from denying its members employment "on the basis of their political beliefs and associations."[1] The gravamen of the complaint is that defendant Bergland, the Secretary of Agriculture, "is dismissing and threatening to dismiss plaintiff's members from their positions . . . for partisan political reasons and threatening to and has appointed political supporters of the Carter administration to the

[1]Complaint, ¶ 4.

positions now occupied by plaintiff's members in consideration of their political support."[2] Additionally, plaintiff alleges that the Department of Agriculture has requested the Civil Service Commission to re-classify the employment positions at issue in order to evade its members' statutory and constitutional rights. Moreover, it is asserted that any action undertaken by the Civil Service Commission (Commission) to this end, as well as, the rules guiding the Commission in this regard, operate to deny plaintiff's members their rights, under the First and Fifth Amendments to the United States Constitution.

On April 22, and April 25, 1977, the Department of Agriculture terminated a total of nine (9) FmHA State Directors and seventeen (17) ASCS State Executive Directors. The following day, at plaintiff's request, a hearing was held on plaintiff's motion for a temporary restraining order which motion was denied. Subsequently, a plaintiff filed a motion for a preliminary injunction, which the defendants opposed. Defendants also submitted a motion to dismiss. On May 12, and May 13, 1977, a hearing was held on the motion for a preliminary injunction consolidated with a hearing on the merits. Fed. R. Civ. P. 65(a)(2). Based on the hearing and the record herein, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. The Agricultural Stabilization and Conservation Service (ASCS) is an agency within the Department of Agriculture. Its principal functions include the ad-

[2]Complaint, ¶ 6, p. 2.

ministration of the acreage allotment and farm marketing quota program under the Agricultural Adjustment Act of 1928, as amended, 7 U.S.C. § 1310 *et seq.*, and of commodity price support and farmland conservation programs. See 7 C.F.R. § 2165. ASCS supervises and works through county committees elected by farmers in each state, pursuant to 16 U.S.C. § 590h(b). State Committees establish the policies for program operations within the State to achieve the Administration's program objectives.

2. State Executive Directors are appointed by the Administrator of ASCS, upon the recommendation of the State Committee. The State Executive Director is responsible for planning, organizing, directing and coordinating the program and management operations of the ASCS State Office, which administers ASCS Programs. He also assists the State Committee in determining and establishing ASCS State policies and programs. There are a total of 50 State Executive Director positions.

3. The Farmers Home Administration (FmHA) is also an agency within the Department of Agriculture. It is responsible for loan and grant and other assistance programs for the benefit of rural areas, including assistance authorized under the Consolidated Farm and Rural Development Act, 7 U.S.C. §§ 1291 *et seq.*

4. FmHA has a National Office in Washington, D.C., 42 State Offices, some serving more than one state, and approximately 1750 local County Offices. Each State Office is under the supervision of a State Director who is responsible to the FmHA administrator, for FmHA programs in one or more states, in accordance with established policies and delegations of authority. See 7 C.F.R. § 1800.22.

5. The testimony of Mr. Victor Senechel, Acting Administrator of ASCS, and Mr. Harold Gross, Assistant to the Secretary of Agriculture for Personnel, indicated that both the FmHA State Directors and the ASCS State Executive Directors, exercise considerable control over the implementation of the administration's agricultural program policies at the state and local level, and, thereby, insure either the success or failure of the programs. This fact was corroborated by statements of three terminated employees, Penrose Hallowell, Frank H. Pope, and Gilbert L. French, who testified as to their budgetary authority and their distribution of millions of dollars in a state program. Each State Director supervised a substantial staff which numbered approximately 100 state-wide. Each director acted as a public speaker and educator regarding the administration's programs. The director thereby served as the administration's pipeline and advocate at the state and the local level.

6. The positions of FmHA State Directors and ASCS State Executive Directors have been designated by the United States Civil Service Commission as "Schedule A" in the "excepted service",[3] pursuant to 5 U.S.C. § 3302 and 5 C.F.R. §§ 6.2, 213.3101 *et seq.* The three schedules in the "excepted service" are defined as follows:

> Schedule A. Positions other than those of a confidential or policy-determining character for which is not practicable to examine shall be listed in Schedule A.

[3]The term "excepted service" connotes positions "excepted" from the competitive requirements of the Civil Service Commission., 5 C.F.R. § 6.1.

> Schedule B. Positions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination shall be listed in Schedule B. Appointments to these positions shall be subject to such noncompetitive examination as may be prescribed by the Commission.
>
> Schedule C. Positions of a confidential or policy-determining character shall be listed in Schedule C.

7. On March 1, 1977, the Department of Agriculture requested the Commission to convert the ASCS positions from Schedule A to Schedule C. The Commission has not yet acted on the request. As of the date of the hearing, the Department of Agriculture has not requested a conversion for the Farmers Home Administration positions.

8. On April 22, and April 25, 1977, the Department of Agriculture and Mr. Victor A. Senechel, Acting Administrator of ASCS, indicated that at the direction of the Secretary of Agriculture, a review was undertaken of all incumbents in the FmHA and ASCS directors positions. The objective of the review was to determine which individuals were of such outstanding quality that they would be retained. Mr. Senechel conducted the review based on his personal knowledge of the incumbents and his lengthy experience with the Department's programs. Mr. Gross participated in overseeing the review of both the agencies' positions and received comments from officials of the previous administration, civil rights and public groups, members of Congress, and State governors.

9. Because the FmHA and ASCS State Directorships are positions excepted from the competitive service, they were viewed historically as patronage jobs. Thus, it was generally understood and expected that the incumbents would be replaced by individuals who supported the policies and programs of the new administration.

10. It was the desire of the Department of Agriculture to simplify the proceedings by avoiding problems of veterans preference. The termination of non-veterans, who would have no right of administrative appeals, occurred first.

11. Although all incumbents, except one, were appointed during the Nixon-Ford administrations, the testimony was uncontroverted that the Carter administration did not know in fact to which political party the incumbents belonged, nor did officials at the Department of Agriculture, at any time, suggest or coerce the incumbents to support the Democratic Party in return for retaining their jobs.

Conclusions of Law

1. The Civil Service Commission is not properly before this Court because it is not a usable entity *eo nomine. Blackmar v. Guerre,* 342 U.S. 512, 515 (1952).

2. Furthermore, the Court lacks subject matter jurisdiction over the controversy with respect to the issues addressed to the Commission. The Commission has not taken any action to remove any positions from Schedule A. Therefore, plaintiff has failed to present issues which can be "pressed before the Court with the clear concreteness provided when a question emerges precisely framed and necessary for decision from a class

of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demand interests . . ." *Flast v. Cohen,* 392 U.S. 83, 95-97 (1968). In such circumstances, the Court is not presented with a case or controversy sufficient to satisfy the jurisdictional requirements of Article III of the Constitution. See *International Long Shoremen's and Warehousemen's Union v. Boyd,* 347 U.S. 222 (1954).

3. Plaintiff has failed to demonstrate that the terminated employees have a statutory or constitutional right to a statement of reasons and a hearing upon dismissal.

4. In order to establish a right to such procedural due process, plaintiff must show that such a right is conferred by statute, by regulation, by the terms of this employment, or that such a right is afforded under the Fifth Amendment to the Constitution because of a property interest in the job.

5. An employee in the excepted service, however, is simply not entitled to the benefits accorded those in the competitive service under the Lloyd-LaFollette Act, 5 U.S.C. § 7501. *Chollar v. United States,* 130 Ct.Cl. 338 (1954). Specifically, an employee in the excepted service, who is not a veteran, has no statutory or regulatory right to a statement of reasons, or adverse action appeal rights. 5 C.F.R. § 752.103(a)(6); see also *Vitarelli v. Seaton,* 359 U.S. 535, 539 (1959).

6. In light of the nature and terms of the employment, (*e.g.,* the excepted service), and in view of the fact that the non-veterans are excepted from statutory provisions granting due process protections, there is no property right to continued employment under which constitutional protections could be invoked. *Codd v.*

Velger, ____ U.S. ____, 97 S.Ct. 882, 884 (1977); *Board of Regents v. Roth,* 408 U.S. 564, 576-578 (1972); *Keim v. United States,* 177 U.S. 290 (1900). Indeed, our own Court of Appeals has made it clear that:

> [D]etermining the employment relationship . . . specifically negates a reasonable prospect of continued employment which might otherwise give rise to a legitimate claim of entitlement requiring procedural due process protection.

Mazeleski v. Treusdell, No. 75-1817 op. 13-14 (D.C. Cir. April 26, 1977).

7. The discharge of plaintiff's members does not constitute a violation of their First Amendment rights to freely associate. Plaintiff's reliance on the Supreme Court's recent decision in *Elrod v. Burns,* 427 U.S. 347 (1976) is misplaced. The plaintiffs in *Elrod* whose discharge was found to violate the First Amendment, were employees of the Cook County, Illinois, Sheriff's Office, not Federal employees. They occupied ministerial positions such as process server, bailiff, security guard, and clerk. The duties and responsibilities of the positions affected here are obviously of an entirely different nature from those occupied by the plaintiffs in *Elrod.*

8. Even assuming *arguendo* that *Elrod* is applicable to the Federal Government's Schedule A employees, the facts of the instant case fall within the exception in *Elrod,* not the general rule. In *Elrod,* five justices agreed that plaintiffs because they occupied only nonpolicy-making, nonconfidential positions, could not be discharged upon the sole ground of their political beliefs. However, the plurality opinion indicated that, if the plaintiffs had occupied policy-making positions, a

dismissal for political reasons would have been justified. 427 U.S. at 367-368. The Court discussed the policy-making/nonpolicy-making distinction as follows:

> No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited resposibilities is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many respon-
>
> limited and well-defined objectiveds. *An employee with responsibilities that are not well-defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals* . . . 427 U.S. at 367-368 (emphasis added)

9. The responsibilities of FmHA State Directors (all of whom are grade GS-15 employees) and ASCS State Executive Directors (who are either grade GS-13, GS-14, or GS-15 employees) as set forth in their position descriptions are "policymaking" responsibilities, as that term is defined in *Elrod.* The ASCS State Executive Director, grade GS-15, for example is described as

> [F]ully responsible for planning, organizing, and directing the program and management operations of ASCS activities throughout the State. Within broad policy, makes decisions

> and commitments on all phases of administration of the assigned programs, and actively participates . . . in State ASCS program and policy formulation. Recommends changes and revisions in State and National policies . . .

Similarly, the FmHA State Director:

> [F]ormulates and implements the total FHA program within the State jurisdictional area, exercising executive leadership in developing and implementing operating principles and practices desirable or necessary to promote and achieve the purposes and objectives of the overall FHA program or specialized phases thereof. Gives emphasis to development of annual goals and long-range plans of operations. . . .

These responsibilities are of broad scope, and include participation in the formulation of program policies and procedures. The difference between these positions and those of the plaintiffs in *Elrod* is substantial.

10. That these positions have been designated as Schedule A by the Civil Service Commission, rather than Schedule C "confidential or policy-determining positions," 5 C.F.R. § 213.3301, does not mean that they are not policy-making" positions within the ambit of *Elrod.*

11. In *Elrod,* plaintiffs were discharged because they were not members of a political party and had failed to obtain the sponsorship of one of the party's leadership. It appears from the facts of *Elrod* that plaintiffs in that case could have retained their employment by the simple expedient of affiliating with the Sheriff's party. From

these facts, the plurality concluded that the Sheriff was interfering with the free association of rights of his employees and the concurring judges concluded that the employees were discharged solely because of their "political beliefs." However, there are no facts in the record to show that the Secretary of Agriculture would have permitted any of these employees to remain if they affiliated with the Democratic Party, no facts to show that the Secretary attempted in any way to require these persons to associate with his own party, or interfered in any way with their exercise of First Amendment rights, as was the case in *Elrod.* Plaintiff has simply failed to establish an infringement of a constitutional guarantee.

12. Plaintiff in seeking a preliminary injunction has failed to satisfy the familiar prerequisites for extraordinary relief enunciated in *Virginia Petroleum Jobbers v. F.P.C.,* 104 U.S. App. D.C. 106, 259 F.2d 921 (1958). *See also Sampson v. Murray,* 415 U.S. 61 (1974).

/s/ J. H. Pratt
JOHN H. PRATT
UNITED STATES DISTRICT JUDGE

APPENDIX B

[No Opinion]

Filed Jun 21 1978

George A. Fisher
Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 77-1632 September Term, 1977

COMMITTEE TO PROTECT THE FIRST AMENDMENT RIGHTS OF EMPLOYEES OF THE DEPARTMENT OF AGRICULTURE,
Appellant

v. Civil Action

BOB BERGLAND, Individually and as Secretary of Agriculture, *et al.* No. 77-0481

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, Chief Judge, MacKINNON, Circuit Judge, and HOFFMAN,* Senior District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

*Of the United States District Court for the Eastern District of Virginia, sitting by designation pursuant to 28 U.S.C. § 292(d) (1970).

On March 29, 1978 appellee addressed a letter to the Chairman of the United States Civil Service Commission, copy of which is attached to this judgment. Since this letter was not available to the District Court prior to its judgment dismissing this case,

It is ORDERED and ADJUDGED by this court that this case is remanded to the District Court to reopen the record for consideration of this letter and any additional evidence that may be related thereto.

Per Curiam

For the Court

/s/ George A. Fisher
George A. Fisher
Clerk

[Received May 31 1978
Clerk of the United States
Court of Appeals]

Honorable Alan K. Campbell
Chairman
U.S. Civil Service Commission
Washington, D.C. 20415

Dear Scotty:

The top State positions in both the Farmers Home Administration (FmHA) and the Agricultural Stabilization and Conservation Service (ASCS) of this Department are filled through Excepted Appointment Authorities. This has been the case since the 1950's when the positions were converted to Schedule A. We are both aware of significant difficulties which this situation has caused with every change of Administration since that time.

We have recently reviewed this situation and I have decided that the existing Schedule A authorities are inappropriate for these key field positions.

There are significant differences between the two Agencies. In the case of ASCS, the State Executive Directors must by the nature of their positions be deeply involved in supporting and defending the farm policies and programs of the Administration. These policies and programs are politically controversial. I firmly believe that these positions should be placed in Schedule C.

The FmHA State Directors are, by contrast, responsible for managing a business type operation. Their loan programs do not generate the same degree of political con-

troversy. In my opinion, existing examining capabilities can properly provide for competitive career appointments to these positions. I believe that FmHA State Directors should be in the career service.

I wanted you to know my intentions on this serious matter in advance of any formal presentation by this Department.

In the very near future, we will be forwarding our formal requests and justifications on this matter.

Sincerely,

APPENDIX C
Filed Aug 11 1978
James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE FOR THE PROTECTION OF FIRST AMENDMENT RIGHTS OF DEPARTMENT OF AGRICULTURE EMPLOYEES, Plaintiff	)	
v.	)	Civil Action No. 77-481
BOB BERGLAND, individually and as Secretary of Agriculture, Defendant	)	

MEMORANDUM

By Order of June 21, 1978, the Court of Appeals remanded this case with directions to reopen the record for consideration of a letter written March 29, 1978 by defendant Bergland to the Chairman, U.S. Civil Service Commission. No. 77-1632 (D.C. Cir.). The action was in the Court of Appeals on appeal by plaintiff of our denial of its application for a preliminary injunction and grant of defendant's motion to dismiss. 434 F. Supp. 314, 320 (D.D.C. June 3, 1977). After the action was remanded, the parties filed cross-motions for summary judgment. For the reasons given hereinafter, defendant's motion for summary judgment will be granted.

The circumstances giving rise to this action are set forth in the Findings of Fact and Conclusions of Law entered herein June 3, 1977. 434 F. Supp. at 316-18. Since our disposition of the action, two letters have passed between Secretary Bergland and the Civil Service Commission, and it is on the strength of these letters that the record herein is reopened. The first letter, dated August 5, 1977, informs the Secretary that the Commission has decided not to approve his request that the Agricultural Stabilization and Conservation Service [ASCS] state executive director positions be transferred within the excepted service from Schedule A [nonconfidential and nonpolicymaking positions for which competitive examinations are impractical] to Schedule C [positions of a confidential or policymaking nature]. The letters gives as a reason only that "[t]he Commission cannot conclude at this time that these [ASCS] positions meet the Schedule C criteria for exception as policy-determining or confidential." The second letter is that which precipitated the remand of this case. It sets forth Secretary Bergland's decision that the "top State positions" in both the ASCS and the Farmers Home Administration [FmHA] should not be classified under Schedule A. However, the letter does not suggest that the two sets of positions should be reclassified similarly:

> There are significant differences between the two Agencies. In the case of ASCS, the State Executive Directors must by the nature of their positions be deeply involved in supporting and defending the farm policies and programs of the Administration. These policies and programs are politically controversial. I firmly believe that these positions should be placed in Schedule C.

> The FmHA State Directors are, by contrast, responsible for managing a business type operation. Their loan programs do not generate the same degree of political controversy. In my opinion, existing examining capabilities can properly provide for competitive career appointments to these positions. I believe that FmHA State Directors should be in the career service.

The ostensible purpose of the Secretary's letter was to inform the Civil Service Commission chairman of "my intentions on this serious matter in advance of any formal presentation by this Department." In an affidavit submitted with defendant's motion, the Secretary indicates he has decided against formally requesting conversion of the FmHA directorships to the career service. Both the ASCS and FmHA positions remain in Schedule A.

Plaintiff's argument is that these two letters, taken together, indicate that the ASCS and FmHA directorships are nonpolicymaking, nonconfidential positions, and hence that the April, 1977 termination of certain directors was improper. Plaintiff asserts that the Secretary's determination that FmHA directors should be in the career service constitutes "an admission that the patronage dismissals of plaintiff's members are not lawful." Similarly, plaintiff argues that the Civil Service Commission "ruling on the non-policy status of the plaintiff [ASCS] state directors must be observed." On consideration of the letters, we conclude that they do not affect the premises which dictated our decision June 3, 1977.

As a preliminary matter, it should be noted that these letters' relevance, if any, is to plaintiff's argument that

the April, 1977 terminations violate the proscription against patronage dismissals of nonpolicymaking, nonconfidential employees. *Elrod v. Burns,* 427 U.S. 347, 373 (1976). In no sense can either letter be construed to confer on ASCS and FmHA directors the benefits and protections accorded those in the competitive service under the Lloyd-LaFollette Act, 5 U.S.C. § 7501. Thus, the sole question is whether either letter affects our previous determination that the ASCS and FmHA directorships are "policymaking" positions within the scope of the exception in *Elrod.* In essence plaintiff's position is that the Commission's determination that ASCS directorships do not qualify for Schedule C status and the Secretary's determination that FmHA directorships should be in the competitive service are each dispositive of the question whether each directorship is a policymaking position. To accept this thesis would be to render an employee's constitutional rights under *Elrod* coextensive with his rights under statute and regulations, and hence to cede the judicial function of delimiting constitutional rights to the executive.

The Supreme Court's statement in *Elrod* that "[n]o clear line can be drawn between policymaking and nonpolicymaking positions" militates against drawing such lines solely on the basis of the schedule or service under which the position is classified. 427 U.S. at 367. Similarly, as we noted in the Findings and Conclusions entered herein, "[t]hat these positions have been designated as Schedule A by the Civil Service Commission, rather than Schedule C 'confidential or policy-determining positions,' 5 C.F.R. § 213.3301, does not mean that they are 'not policy-making' positions within the ambit of *Elrod.*" Secretary Bergland's opinion that the FmHA directorships should be in the competitive service is no

more determinative. Indeed, the distinction drawn in his letter between the ASCS and the FmHA positions seems predicated entirely on the differing political sensitivity of the two sets of directorships, and not at all on any difference in the policymaking responsibilities of the positions. That the FmHA is a "business type operation" the programs of which engender comparatively little political controversy has no discernible bearing on the extent to which FmHA state directors make policy.

In determining previously that the ASCS and FmHA directorships are policymaking positions within the *Elrod* exception, we rejected the argument that the positions' Schedule A status was determinative of that issue. The August 5, 1977 and March 29, 1978 letters effect no change in the duties of these positions; instead, they bear on the classification of the positions. Accordingly they do not affect the validity of our previous conclusions. An Order consistent with the foregoing will be entered this day.

/s/ J. H. Pratt
JOHN H. PRATT
United States District Judge

10 August, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE FOR THE PROTECTION OF FIRST AMENDMENT RIGHTS OF DEPARTMENT OF AGRICULTURE EMPLOYEES, Plaintiff	)	
v.	)	Civil Action
	)	No. 77-481
BOB BERGLAND, individually and as Secretary of Agriculture Defendant	)	

ORDER

This action having been remanded for consideration of a letter of March 29, 1978 from defendant to the chairman, U.S. Civil Service Commission, No. 77-1632 (D.C. Cir. June 21, 1978), and this Court having reopened the record for consideration of said letter and any additional evidence submitted by the parties, and it appearing that said letter and additional evidence do not affect our previous determination herein, *see* Findings of Fact and Conclusions of Law, 434 F. Supp. 314 (D.D.C. 1977), and that defendant is entitled to judgment as a matter of law in the absence of any genuine issue of material fact herein, Fed.R. Civ. P. 56(c), it is by the Court this 10th day of August, 1978

ORDERED, that defendant's motion for summary judgment be, and hereby is, granted, and it is further

ORDERED, that plaintiff's motion for summary judgment be, and hereby is, denied, and it is further

ORDERED, that this action be, and hereby is, dismissed, the parties to bear their own costs.

/s/ J. H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2030

COMMITTEE TO PROTECT THE FIRST AMENDMENT RIGHTS OF EMPLOYEES OF THE DEPARTMENT OF AGRICULTURE, APPELLANT

v.

BOB BERGLAND, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE, APPELLEES

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 77-0481)

Argued October 15, 1979

Decided December 27, 1979

Carl L. Shipley, for appellant.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

John H. E. Bayly, Jr., Assistant United States Attorney with whom *Earl J. Silbert*,* United States Attorney, *John A. Terry, Peter D. George* and *David H. Shapiro*, Assistant United States Attorney were on the brief, for appellee.

Walter H. Fleischer and *Alfred F. Belcuore* were on the brief for Amicus Curiae urging reversal.

Before: LEVENTHAL,** ROBB and WALD, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.**

LEVENTHAL, *Circuit Judge*: This appeal presents a claim that the Secretary of Agriculture had denied employment on the basis of political beliefs and associations. The Committee to Protect the First Amendment Rights of Employees of the Department of Agriculture (Committee) brought the action for declaratory and injunctive relief, claiming that its members had been denied employment on that basis in violation of their constitutional rights. The district court granted the Secretary's motion for summary judgment, and we affirm.

I. BACKGROUND

The Committee is an *ad hoc* organization composed of former employees of the Department of Agriculture who occupied positions in the field service as either State Directors of the Farmers Home Administration (FmHA) or State Executive Directors of the Agricultural Stabilization and Conservation Service (ASCS). The United States Civil Service Commission (Commission) has ex-

* United States Attorney at the time the brief was filed.

** This opinion was written by Circuit Judge Leventhal and concurrences were received from the other Judges prior to his death.

cepted both positions from the competitive civil service, classifying them Schedule A.[1] The Commission's general regulations concerning Schedule A (and Schedule B and C) positions are in the margin.[2] The Schedule A jobs are defined as "positions other than those of a confidential or policy determining character for which it is not practicable to examine . . ." [3]

On April 22 and April 25, 1977, the newly appointed Secretary of Agriculture discharged a total of nine FmHA State Directors and seventeen ASCS State Executive Directors. The Committee brought this lawsuit in district court, and sought injunctive relief, claiming the Secretary was "dismissing and threatening to dismiss [its] members from their positions . . . for partisan political reasons and threatening to and has appointed

[1] 5 C.F.R. §§ 213.3101, 213.3113(d)(3) and (e)(4) (1978).

[2] 5 C.F.R. § 6.2 (1978).

> § 6.2 *Schedules of excepted positions.*
>
> The Commission shall list positions that it excepts from the competitive service in Schedules A, B, and C, which schedules shall constitute parts of this rule, as follows:
>
> *Schedule A.* Positions other than those of a confidential or policy-determining character for which it is not practicable to examine shall be listed in Schedule A.
>
> *Schedule B.* Positions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination shall be listed in Schedule B. Appointments to these positions shall be subject to such non-competitive examination as may be prescribed by the Commission.
>
> *Schedule C.* Positions of a confidential or policy-determining character shall be listed in Schedule C.

[3] 5 C.F.R. § 6.2 (1978); 5 C.F.R. § 213.3101 (1978). The same definition appears in the Commission's regulations regarding such posts in the Department of Agriculture. 5 C.F.R. § 213.3101 (1978).

political supporters of the Carter administration to the positions now occupied by [those] members in consideration of their political support." [4]

The district court denied a temporary restraining order and consolidated the hearings on plaintiff's motion for preliminary injunction and defendants' motion to dismiss the complaint. On June 3, 1977, the district court dismissed the complaint.[5]

Subsequently, two letters were sent from the Chairman of the Commission to the Secretary. On August 5, 1977, the Commission declined the Secretary's request to reclassify State Executive Directors of ASCS from Schedule A to Schedule C.[6] It stated: "The Commission cannot conclude at this time that [State Executive Directors of ASCS] meet the Schedule C criteria for exception as policy-determining or confidential." In the second letter,

---

[4] Complaint, Paragraph 6.

[5] Committee for Protection of First Amendment Rights of Department of Agriculture Employees, 434 F. Supp. 314 (D.D.C. 1977).

[6] The Chairman's letter read:

> Dear Mr. Secretary:
>
> This refers to your request for Civil Service Commission approval to convert from Schedule A to Schedule C 50 State Executive Director positions in the Agricultural Stabilization and Conservation Service.
>
> The Commission cannot conclude at this time that these positions meet the Schedule C criteria for exception as policy-determining or confidential. We are therefore unable to approve your request.

Exhibit "E" of Memorandum of Points and Authorities supplementing appellant's brief.

Secretary's Bergland's request was in a letter to the Commission dated March 1, 1977. Appendix to appellant's brief at 10-11.

dated March 29, 1978, the Secretary refined his position.[7] He repeated his view that difficulties had arisen in consequence of the action taken in the 1950's, which converted to Schedule A the positions of state directors of ASCS and FmHA. He reiterated his opinion that State Directors of ASCS should be converted from Schedule A to

---

[7] Secretary Bergland's letter to Chairman Campbell read:

> Dear Scotty:
>
> The top State positions in both the Farmers Home Administration (FmHA) and the Agricultural Stabilization and Conservation Service (ASCS) of this Department are filled through Excepted Appointment Authorities. This has been the case since the 1950's when the positions were converted to Schedule A. We are both aware of significant difficulties which this situation has caused with every change of Administration since that time.
>
> We have recently reviewed this situation and I have decided that the existing Schedule A authorities are inappropriate for these key field positions.
>
> There are significant differences between the two Agencies. In the case of ASCS, the State Executive Directors must by the nature of their positions be deeply involved in supporting and defending the farm policies and programs of the Administration. These policies and programs are politically controversial. I firmly believe that these positions should be placed in Schedule C.
>
> The FmHA State Directors are, by contrast, responsible for managing a business type operation. Their loan programs do not generate the same degree of political controversy. In my opinion, existing examining capabilities can properly provide for competitive career appointments to these positions. I believe that FmHA State Directors should be in the career service.
>
> I wanted you to know my intentions on this serious matter in advance of any formal presentation by this Department.
>
> In the very near future, we will be forwarding our formal requests and justifications on this matter.

Exhibit "F" of Memorandum of Points and Authorities supplementing appellant's brief.

Schedule C. He indicated a distinction as to FmHA State Directors which he believed "should be in the career service." [8] This court remanded the case to the district court for consideration of the March 29, 1978 letter and any related evidence.[9]

Upon remand, the district court reopened the record to consider the letter of August 5, 1977 as well as that of March 29, 1978. Both parties filed motions for summary judgment. By Memorandum Opinion and Order dated August 10, 1978, the district court, finding that the "letter and additional evidence [did] not affect [its] previous determination," granted summary judgment [10] to the Secretary. Plaintiff's appeal followed.

II. Analysis

In *Elrod v. Burns*, 427 U.S. 347 (1975), the Supreme Court declared unconstitutional the dismissal of nonpolicymaking government employees because of their partisan political affiliation or nonaffiliation. Justice

[8] At oral argument, counsel for the government represented that the Secretary had repudiated his earlier position that FmHA State Directors belonged in the classified civil service. The *amicus curiae* makes reference to the fact that the Secretary had "retreated" from the earlier position, and cites a Declaration of Bob Bergland dated July 24, 1978 to the effect that "the appropriate classification to permit needed flexibility in appointment authority for [the position of FmHA] is Schedule C." Brief for Amicus Curiae Mahlon M. Delong at 14.

[9] Committee to Protect the First Amendment Rights of Employees of the Department of Agriculture v. Bergland (D.C. Cir. No. 77-1632, June 21, 1978).

[10] Committee for the Protection of First Amendment Rights of Department of Agriculture Employees v. Bob Bergland (Civil Action No. 77-0481, August 11, 1978), reproduced as Exhibit "C" of Memorandum or Points and Authorities Supplementing Appellant's Brief.

Brennan, writing for the plurality, relied upon *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) and *Perry v. Sinderman*, 408 U.S. 593 (1972), to advance the proposition that government cannot condition the retention of government positions on demands which would be unconstitutional if made directly. 427 U.S. at 358-60. The opinion responds to the needs of a new administration to insure that its policies will not be undercut by obstructionist tactics, but it does so by "limiting patronage dismissals to policymaking positions." 427 U.S. at 367. Justices Stewart and Blackmun completed the majority, confining themselves to concurring in the result on the ground that a "nonpolicymaking, nonconfidential government employee can [not] be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs." 427 U.S. at 374-75 (Stewart, J. concurring). In applying the *Elrod* standard, therefore, we must look to (1) the nature of the position involved and (2) the ground for dismissal.

A. *The Nature of the Positions Involved*

The Committee contends that the two posts held by its members are not policymaking positions. The district court disagreed. While it is true that "[n]o clear line can be drawn between policymaking and nonpolicymaking positions," 427 U.S. at 367, the Supreme Court has proffered some general principles that guide our consideration:

> While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well

> defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals.

Id. at 367-68.

In determining whether the pertinent positions are policymaking, the district court considered the published job descriptions.[11] The ASCS State Executive Director, grade GS-15, is described as:

> [F]ully responsible for planning, organizing, and directing the program and management operations of ASCS activities throughout the State. Within broad policy, makes decisions and commitments on all phases of administration of the assigned programs, and actively participates . . . in State ASCS program and policy formulation. Recommends changes and revisions in State and National policies.

The FmHA State Director, grade GS-15:

> [F]ormulates and implements the total FHA program within the State jurisdictional area, exercising executive leadership in developing and implementing

[11] Order of June 3, 1977, *supra* note 5. Findings of Fact 1-4, 434 F. Supp. 314 at 316-17; Conclusion of Law 9, *id.* at 319.

It is possible that in a particular case an employee might believe that the job description was overblown, and that it is a facade hiding what is actually performance of a ministerial function. But that would not necessarily end the matter, because the cabinet officer might wish to change the method of operation so as to assure a stronger policy component in order to achieve the objectives of his administration. We need not, and do not, reach that point, however, because in this case appellant has not presented the matter to us on the basis that it has penetrated a facade.

> operating principles and practices desirable or necessary to promote and achieve the purposes and objectives of the overall FHA program or specialized phases thereof. Gives emphasis to development of annual goals and long-range plans of operation.

There is no contention that these job descriptions are a spurious facade.

In his inquiry, the district judge also considered testimony from two government witnesses and three of the terminated employees that the directors "exercise considerable control over the implementation of the administration's agricultural program policies at the state and local level, and, thereby, insure either the success or failure of the programs." [12]

This evidence fully justified the district court in concluding that the positions in question were policymaking ones. That conclusion is reinforced by the likelihood that persons administering huge Federal government programs for an entire state will have a high policy component to their activities, both because such large scale exercise of power usually implicates substantive internal policy, and because such positions are a natural source for influential recommendations of changes in policy. Each state director supervises a staff of nearly 100 statewide and acts as "the administration's pipeline and advocate at the state and local level." [13]

Appellant argued its case, both in the district court and before us, on the theory that the courts are controlled by the Commission's determination, in classifying the posts, that they were nonpolicymaking. We reject that view. Obviously, a Commission determination would not be conclusive against an individual who claimed that

[12] Finding of Fact 5, 434 F. Supp. 314, 317.

[13] *Id.*

the agency had been overly restrictive in defining his constitutional rights. The content and scope of constitutional rights—their minima and maxima—are the special province of the courts.[14]

In approaching the constitutional inquiry we of course take into consideration the determination of the Civil Service Commission. In this litigation, however, we are confronted by the difficulty that the Commission has evolved a specialized terminology and set of classifications. The positions in Schedules A and C are both "excepted" from the competitive civil service, but the relationship between these schedules is not easy to ascertain—as is evident from a reference to the Commission's reports.[15] What is certainly plain is that the basis of the

[14] Appellant argues that a reviewing court must give deference to an agency's interpretation of its governing statute and regulations, and that, therefore, the Civil Service Commission's classification of ASCS and FmHA positions should control our consideration of the matter. Appellant's brief at 10-11. This argument misses the point. We are not interpreting the CSC regulations, rather we are defining the constitutional status of the positions held by appellant's members. The question in this case is not what the CSC regulations mean, but whether they are conclusive on the constitutional isue.

[15] The two broad categories of federal employment are the competitive service and the excepted service, with the "career service" being generally a subset of the former. The competitive service includes any position for which an "exam" is given, which "exam" can be either a written test or a more general "review" of the candidate's education and experience. *See generally* United States Civil Service Commission Fiscal 1977 Annual Report (1978); *see also* Federal Personnel Manual at 212-3 to 212-5 (July 31, 1978). Schedule A and Schedule C positions are generally in the excepted service, but some of them are held by employees with competitive status under conditions that make the positions competitive while those employees remain in them. Federal Personnel Manual at 212-4 (July 31, 1978).

Commission's distinctions is different from the basis underlying the *Elrod* categories.[16]

The point is dramatized by the fact, brought out at oral argument, that at least some attorneys on the White House staff are classified Schedule A—that is, classified by the Commission as occupying positions not of a policymaking or confidential character. In fact, there are substantial numbers of attorneys in government service classified as Schedule A.[17] So also are law clerks, chaplains, and some officials appointed by the President without confirmation by the Senate, among others.[18] By contrast at least some stenographic secretaries, a category of secretaries distinct from private secretaries, are classified as policymaking or confidential.[19]

A court ruling that a position has a policymaking character which makes *Elrod* inapplicable is not to be taken as condemning any action of the Commission in classifying the position as Schedule A. The Civil Service Commission may classify positions as Schedule A rather than Schedule C in order to nudge forward toward the goal of enhancing a "career" civil service. Both Schedule A and Schedule C positions are excluded from the competitive civil service. The distinction has legal—not constitutional—significance in that veterans holding Schedule A positions acquire procedural rights under current laws

[16] The Civil Service regulations involved here were promulgated in 1963, more than a decade before *Elrod*. Consequently, it cannot be argued that they were designed to implement the standards articluated in that case.

[17] § 213.3101 Federal Personnel Manual (July 31, 1978).

[18] *Id.*

[19] *See, e.g.*, United States Civil Service Commission Fiscal 1977 Annual Report at 78 (1978).

and regulations.[20] And in common understanding, Schedule A positions are considered less "political" than those in Schedule C, so that in practice holders of Schedule A positions are less likely to seek or accept political assignments on their own time, and are more likely to have *de facto* tenure even with political changes. However, if a position does have significant policymaking components, it cannot be given *Elrod*-constitutional status merely on the basis of hopeful expectations. And appellant did not challenge the analysis of the district court, but relied solely on the Commission's classification.

In the initial proceeding on these positions, the district court did not ignore the CSC designation of them, but explicitly weighed that as a factor in its consideration of the nature of the two positions involved.[21] On remand, the court expressly considered whether either of the two letters affected its "previous determination that the ASCS and FmHA directorships are 'policymaking' positions within the scope of the exception in *Elrod*." [22] It concluded that the "letters effect no change in the duties of [the] positions . . . instead, they bear on the classification of the positions," [23] and that its earlier determination was correct. We agree.

B. *Ground for Dismissal*

Elrod holds that it is impermissible for a government agency to dismiss a nonpolicymaking employee solely for political reasons. It does not bar every termination of a nonpolicymaking official. In invoking *Elrod*, appellant relies on a statement of the district judge during the

[20] None of the terminations challenged by the appellant related to veterans.

[21] 434 F. Supp. 314 at 320.

[22] Memorandum of August 11, 1978, *supra* note 4, at p. 3.

[23] *Id.* at p. 4.

course of the proceeding that "these were patronage dismissals, pure and simple." [24] But the district court decision notes uncontroverted testimony that the administration did not know to which political party the incumbents belonged and that the Secretary never attempted to coerce the members of Appellant's group to change their party in order to retain their jobs.[25] There is evidence in the record that the purpose of the Secretary's personnel review was to spotlight incumbents "of such outstanding qualities that they should be retained" when most incumbents were being replaced "by individuals who supported the policies and programs of the new administration." [26]

This case differs in some significant respects from *Elrod* as to the reasons for the terminations. The district court did not find that the employees were dismissed solely for political reasons, and indeed cited parts of the record that point to a motivation of the Secretary to enhance policy formulation and execution. However, since we hold that the positions involved are policymaking, we need not and do not consider whether appellant's showing would suffice to establish a constitutional infringement if the positions were nonpolicy in character.

III. Conclusion

It is for the court, not the Civil Service Commission, to decide whether a position is policymaking for constitutional purposes within the meaning of *Elrod v. Burns*. The district court gave due consideration to the Commission's classification, and to the correspondence between the Commission and the Secretary of Agriculture.

[24] Transcript of May 13, 1977 at 100.

[25] Order of June 3, 1977, *supra* note 5, 434 F. Supp. at 318.

[26] *Id.* at 317-18.

It emphasized the evidence introduced on the nature of the positions. We affirm the conclusion that the positions occupied by the members of appellant's group were policy-making and therefore the discharge of the incumbents did not infringe upon their constitutional rights.[27]

Affirmed.

---

[27] As already noted, *supra* page 7, Justice Brennan's opinion *Elrod* stated that the need to implant the policy of a new administration is secured by permitting "patronage dismissals" for policymaking positions. There is no indication that the dismissal must be further justified by a determination that the incumbent would fall short in discharge of new policy directives.

No. 79-1509

APR 14 1980

IN THE

Supreme Court of the United States

October Term 1979

COMMITTEE TO PROTECT THE FIRST AMENDMENT RIGHTS OF EMPLOYEES OF THE DEPARTMENT OF AGRICULTURE,

Petitioner,

v.

BOB BERGLAND, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE,

Respondent.

BRIEF SUPPLEMENTING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April, 1980

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IN THE

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October Term 1979

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COMMITTEE TO PROTECT THE FIRST AMENDMENT RIGHTS OF EMPLOYEES OF THE DEPARTMENT OF AGRICULTURE,
Petitioner,

v.

BOB BERGLAND, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE,
Respondent.

BRIEF SUPPLEMENTING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This supplemental brief is filed in order to apply the principles set forth by this Court in its recent decision in *Branti v. Finkel,* U.S. (1980) (No.78-1654, decided March 31, 1980), to the case now pending before the Court on a Petition for Writ of Certiorari.

In *Branti* the Court held that the issue in patronage cases is not whether the label "policymaker" or "confidential" fits the particular public office in question,

but rather the issue is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office (slip op. pg. 11). Thus, the Court plainly announced its determination that political patronage constitutionally cannot serve as the basis for dismissing otherwise competent individuals even though such individuals may occupy "policymaking" or "confidential" positions.

In view of this determination, petitioner respectfully submits that even if petitioner's members did occupy policymaking or confidential positions, their dismissal constitutionally was impermissible under *Branti* because party affiliation is not an appropriate requirement for the effective performance of the duties as State Executive Directors of the Agricultural Stabilization and Conservation Service ("ASCS") or as State Directors of the Farmers Home Administration ("FmHA"). In short, membership in the Democratic party is not essential to the discharge of petitioner's members' governmental responsibilities.

While patronage appointments no doubt serve a valuable and important function in the higher echelons of government such as presidential appointees and their immediate aides, the Court has determined that such interests must yield to First Amendment rights when, as here, party membership is not essential to the discharge of the employees' duties.

Petitioner submits that its members are too far removed from the political hierarchy to justify constitutionally a patronage dismissal. State Executive Directors are appointed by the Adminstrator of ASCS and then only upon recommendation of the State Committee. State Directors of FmHA are appointed in a similar

manner.[1] The principal function of ASCS is to administer the acreage allotment and farm marketing quota program under the Agricultural Adjustment Act of 1928, as amended (7 USC §1310, *et seq.*), and the commodity price support and farmland conservation programs. The State Executive Director is responsible for planning organizing, directing and coordinating the state program and for managing operations of the state ASCS office.[2] The Farmers Home Administration is the agency within the Department of Agriculture responsible for loan and grant and other assistance programs for the benefit of rural areas. The FmHA State Director is responsible to the FmHA Administrator for FmHA programs, in accordance with established policies and delegations of authority (7 CFR §1800.22).[3]

Plainly, whatever policymaking, if any, that occurs at the State Director level does not relate to any partisan political interests. Accordingly, petitioner respectfully suggests that the Court may wish to consider remanding the case to the court of appeals in light of *Branti v. Finkel* so that court may apply the constitutional standards set forth therein.

Respectfully submitted,

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April, 1980

[1] Petition, App. 3a.
[2] *Id.*
[3] *Id.*

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No. 79-1509

In the Supreme Court of the United States

OCTOBER TERM, 1979

COMMITTEE TO PROTECT THE FIRST AMENDMENT RIGHTS OF EMPLOYEES OF THE DEPARTMENT OF AGRICULTURE, PETITIONER

v.

BOB BERGLAND, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 23a-36a) is not yet reported. The decision of the district court (Pet. App. 16a-22a) is unreported. The previous order of the court of appeals remanding the case for further consideration (Pet. App.

12a-13a) is unreported. The initial decision of the district court (Pet. App. 1a-11a) is reported at 434 F. Supp. 314.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1979. The petition for a writ of certiorari was filed on March 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the discharge of high-ranking officials in the Department of Agriculture, in order to appoint individuals who supported the policies and programs of the administration, violated the First Amendment.

STATEMENT

Petitioner is an *ad hoc* committee composed of former employees of the Department of Agriculture who occupied positions in the field service either as State Executive Directors of the Agricultural Stabilization and Conservation Service (ASCS) or as State Directors of the Farmers Home Administration (FmHA) (Pet. 4; Pet. App. 1a, 24a). Petitioner brought this action to challenge the discharge of its members by the Department as a violation of, *inter alia*, the First Amendment.

1. The ASCS is an agency within the Department of Agriculture (Pet. App. 2a). Its principal functions include the administration of the acreage allotment and farm marketing quota program and of

commodity price support and farmland conservation programs (*id.* at 2a-3a). Each state has an ASCS State Executive Director who is appointed by the Administrator of ASCS upon the recommendation of the state committee (*id.* at 3a). The State Executive Director occupies a GS-13 to GS-15 position (*id.* at 9a) and is (*id.* at 9a-10a)

> [f]ully responsible for planning, organizing, and directing the program and management operations of ASCS activities throughout the State. Within broad policy, makes decisions and commitments on all phases of administration of the assigned programs, and actively participates * * * in State ASCS program and policy formulation. Recommends changes and revisions in State and National policies.

FmHA is an agency within the Department of Agriculture that is responsible for loan, grant, and other assistance programs for the benefit of rural areas (Pet. App. 3a). FmHA has 42 state offices, each of which is under the supervision of a State Director who is responsible to the FmHA Administrator (*ibid.*). The State Director holds a GS-15 position (*id.* at 9a) and (*id.* at 10a)

> [f]ormulates and implements the total [FmHA] program within the State jurisdictional area, exercising executive leadership in developing and implementing operating principles and practices desirable or necessary to promote and achieve the purposes and objectives of the overall [FmHA] program or specialized phases thereof. Gives

emphasis to development of annual goals and long-range plans of operations.

The positions of ASCS State Executive Director (5 C.F.R. 213.3113(d)(3)) and FmHA State Director (5 C.F.R. 213.3113(e)(4)) were designated Schedule A positions by the Civil Service Commission (Pet. App. 4a).[1] Schedule A officials are one of three groups excepted from the competitive civil service pursuant to 5 U.S.C. (Supp. II) 3302 and 5 C.F.R. 6.2 and 213.3101 *et seq.* The three excepted service groups are defined as follows (5 C.F.R. 6.2; Pet. App. 4a-5a):

> *Schedule A.* Positions other than those of a confidential or policy-determining character for which it is not practicable to examine shall be listed in Schedule A.
>
> *Schedule B.* Positions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination shall be listed in Schedule B. Appointments to these positions shall be subject to such noncompetitive examination as may be prescribed by the Commission.
>
> *Schedule C.* Positions of a confidential or policy-determining character shall be listed in Schedule C.

2. Shortly after respondent took office in 1977, he directed that a review be made of all incumbent

[1] The Commission's duties in this regard have now been assumed by the Office of Personnel Management. See 5 U.S.C. (Supp. II) 1101 *et seq.*

ASCS and FmHA directors to determine which individuals were of such outstanding quality that they should be retained in the new administration (Pet. App. 5a). This review was conducted by the Acting Administrators of ASCS and FmHA based on their personal knowledge of those officials and their lengthy experience with the Department's programs (*ibid.*). On April 22 and April 25, 1977, the Department discharged 17 ASCS State Executive Directors and nine FmHA State Directors (*id.* at 2a).[2]

3. Petitioner brought this action in March 1977 for declaratory and injunctive relief to challenge the anticipated dismissal of its members as, among other things, a violation of the First Amendment (Pet. App. 1a-2a). Petitioner alleged that its members were to be discharged "on the basis of their political beliefs and associations" and that respondent was "dismissing and threatening to dismiss [petitioner's] members from their positions * * * for partisan political reasons and threatening to and has appointed political supporters of the Carter administration to the positions now occupied by [petitioner's] members in consideration of their political support" (*ibid.*). On April 25, 1977, petitioner sought a temporary restraining order to enjoin the announced discharges.

[2] Because of a statutory preference for veterans, these discharges were limited to persons who were not veterans (Pet. App. 6a, 34a n.20). At the time, there were 20 non-veteran ASCS State Executive Directors and 14 non-veteran FmHA State Directors (Govt. C.A. App. 161-162, 190, 199).

After denying the temporary restraining order, and following an evidentiary hearing on petitioner's request for a preliminary and permanent injunction, the district court dismissed the complaint (Pet. App. 1a-11a, 26a). The court found that, in light of the Department's traditional practices, "it was generally understood and expected that the incumbents would be replaced by individuals who supported the policies and programs of the new administration" (*id.* at 6a). The court also found that "[a]lthough all incumbents, except one, were appointed during the Nixon-Ford administrations, the testimony was uncontroverted that the Carter administration did not know in fact to which political party the incumbents belonged, nor did officials at the Department of Agriculture, at any time, suggest or coerce the incumbents to support the Democratic Party in return for retaining their jobs" (*ibid.*). Based on these findings, the court concluded (*id.* at 11a) that petitioner "has simply failed to establish an infringement of a [First Amendment] constitutional guarantee" under *Elrod* v. *Burns*, 427 U.S. 347 (1976), because "there are no facts in the record to show that [respondent] would have permitted any of these employees to remain if they affiliated with the Democratic Party, no facts to show that [respondent] attempted in any way to require these persons to associate with his own party, or interfered in any way with their exercise of First Amendment rights, as was the case in *Elrod*."

In addition, the district court further determined that the positions in question were "policymaking" positions within the meaning of *Elrod* v. *Burns* (Pet. App. 9a). The court found from the record, including the testimony of several of petitioner's members who had been discharged, that the ASCS State Executive Directors and the FmHA State Directors (*id.* at 4a)

> exercise considerable control over the implementation of the administrator's agricultural program policies at the state and local level, and, thereby, insure either the success or failure of the programs. * * * [Three former directors] testified as to their budgetary authority and their distribution of millions of dollars in a state program. Each State Director supervised a substantial staff which numbered approximately 100 statewide. Each director acted as a public speaker and educator regarding the administration's programs. The director thereby served as the administration's pipeline and advocate at the state and the local level.

Taking into account the directors' responsibilities as well as the Civil Service Commission's classification of these offices as Schedule A positions rather than Schedule C positions (*id.* at 4a-5a, 10a), the court concluded that "[t]he responsibilities of FmHA State Directors * * * and ASCS State Executive Directors * * * are 'policymaking' responsibilities, as that term is defined in *Elrod*" (*id.* at 9a), and therefore that the dismissal of these employees, even if for political reasons, did not violate the First Amendment.

4. The court of appeals affirmed (Pet. App. 23a-36a).[3] The court found that the job descriptions for the two director positions and the testimony offered at the evidentiary hearing "fully justified the district court in concluding that the positions in question were policymaking ones" under *Elrod* v. *Burns* (Pet. App. 31a). The court of appeals also observed that the district court's "conclusion is reinforced by the likelihood that persons administering huge Federal government programs for an entire state will have a high policy component to their activities, both because such large scale exercise of power usually implicates substantive internal policy, and because such positions are a natural source for influential recommendations of changes in policy" (*ibid.*). Finally, the court of appeals agreed (*id.* at 31a-34a) with the district court that the Civil Service Commission's classification of these positions, while relevant, was not determinative on the constitutional issue, and it concluded that petitioner's argument that the agency's interpretation of its governing statute and regulations must be given controlling deference by the courts in this case "misses the point. We are not interpreting the CSC regulations, rather we are defining the constitutional status of the positions held by [petitioner's] members. The question in this case is not what the CSC regulations mean, but whether they are conclusive on the constitutional issue" (*id.* at 32a n.14).

[3] On petitioner's first appeal, the court of appeals initially remanded the case (Pet. App. 12a-13a) to the district court for consideration of a letter dated March 29, 1978 (*id.* at 14a-15a), from respondent to the Civil Service Commission stating that the ASCS State Executive Directors should be designated as Schedule C positions and that the FmHA State Directors should be classified in the career service. This was the second exchange of correspondence between respondent and the Commission concerning the appropriate classifications for these two positions (*id.* at 26a n.6). On remand, the district court, after considering both sets of correspondence, granted respondent's motion for summary judgment and again dismissed the complaint (*id.* at 16a-22a). The court found that these letters did not affect its previous determination that the two director positions were "policymaking" under *Elrod* v. *Burns*, since both positions remained on Schedule A and were not reclassified (*id.* at 18a), the Secretary had subsequently repudiated the view that the position of FmHA State Director properly belonged in the Career Service (*ibid.*), and, of greatest importance, the regulatory classification of a position as policymaking or non-policymaking for purposes of the civil-service system was not conclusive on the First Amendment issue (*id.* at 19a-20a). Petitioner then appealed from this decision of the district court.

With respect to the ground for the Department's dismissal of petitioner's members, the court of appeals noted that there was "uncontroverted testimony that the administration did not know to which political party the incumbents belonged and that [respondent] never attempted to coerce the members of [petitioner's] group to change their party in order to retain their jobs" (Pet. App. 35a). The court also referred to "evidence in the record that the purpose of [respondent's] personnel review was to spotlight incumbents 'of such outstanding qualities that they should be retained' when most incumbents were being replaced 'by individuals who supported the policies and programs of the new administration.' * * * The

district court did not find that the employees were dismissed solely for political reasons, and indeed cited parts of the record that point to a motivation of [respondent] to enhance policy formulation and execution" (*ibid.*). However, since it concluded that the two director positions were policymaking in nature and thus that the discharges were constitutionally valid under *Elrod* v. *Burns* even if politically motivated, the court of appeals did not resolve the question whether the terminations in this case were in fact based solely on political reasons that would be constitutionally impermissible for non-policymaking positions.

ARGUMENT

1. Petitioner principally contends that the Civil Service Commission's "regulations defining the * * * [ASCS State Executive Director and FmHA State Director] positions as non-policy determining and non-confidential, taken together with the letters [between respondent and the Commission], conclusively established that the dismissals constitutionally were impermissible" (Pet. 6), or that, at the least, "the determination of the Civil Service Commission respecting the non-policy determining, non-confidential nature of the positions involved herein is entitled to great deference" (*id.* at 10).

The courts below correctly rejected this contention. For the reasons more fully stated by the district court (Pet. App. 10a, 18a-20a) and the court of appeals (*id.* at 31a-34a), the Commission's regulatory classification is not dispositive on the First Amendment issue. As the court of appeals observed (id. at 32a), "[t]he content and scope of constitutional rights * * * are the special province of the courts." Moreover, the Commission's classification of a position for purposes of the statutory civil-service system is based on different considerations and is designed to further different objectives than is the constitutional analysis required by the First Amendment.[4] While both determinations rest in part on an assessment whether the particular position entails "policymaking" responsibilities, the Civil Service classification, although relevant (*id.* at 34a), is not binding with respect to the constitutional question.[5]

---

[4] The court of appeals explained (Pet. App. 32a-33a):

> What is certainly plain is that the basis of the Commission's distinctions is different from the basis underlying the *Elrod* categories.
>
> * * * *
>
> A court ruling that a position has a policymaking character which makes *Elrod* inapplicable is not to be taken as condemning any action of the Commission in classifying the position as Schedule A. The Civil Service Commission may classify positions as Schedule A rather than Schedule C in order to nudge forward toward the goal of enhancing a "career" civil service.

In addition, as the court of appeals noted (*id.* at 33a n.16), the Civil Service regulations were promulgated more than a decade before this Court's decision in *Elrod* v. *Burns* and were not intended to implement the protections of the First Amendment.

[5] As petitioner recognizes (Pet. 7 n.5), the Schedule A classification covers a wide range of positions with quite disparate duties and responsibilities, including such positions

Furthermore, in *Branti* v. *Finkel*, No. 78-1654 (Mar. 31, 1980), which was decided after the opinions below had been issued, this Court explained that, in cases involving allegedly political dismissals, "the ultimate [First Amendment] inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved" (slip op. 11). Since the proper First Amendment standard is not simply whether the position can be described as "policymaking" in character, the Civil Service classification of a position cannot be considered decisive on the constitutional issue.

2. Petitioner advances the alternative contention (Pet. Supp. 1-3) that this case should be remanded

as a secretary at the Federal Home Loan Bank Board (5 C.F.R. 213.3154(a)); lamplighters in the United States Coast Guard and laborers on the Alaska Railroad in the employ of the Department of Transportation (5 C.F.R. 213.3194(a)(2) and (b); GS-13 to GS-15 professional positions in the Council on Environmental Quality (5 C.F.R. 213.3103(c)); the executive secretary to the U.S.-U.S.S.R. Standing Consultative Commission (SALT) and special advisors in the immediate office of the Secretary and Deputy Secretary of Defense (5 C.F.R. 213.3106(a)(1) and (a)(6); unskilled laborers, temporarily employed by the Department of the Army, who engage in handling ordnance material and ammunition (5 C.F.R. 213.3107(a)(2)); deputy United States marshals employed on an hourly basis for intermittent service (5 C.F.R. 213.3110(a)(1)); and all staff positions on the National Security Council (5 C.F.R. 213.3103(g)). It is evident that the same First Amendment protection against political discharges is not properly applicable to all of these diverse positions simply because they are similarly classified under Schedule A for civil-service purposes.

for further consideration in light of the intervening decision in *Branti* v. *Finkel*.

In our view, the existing record adequately establishes that dismissals of employees from the positions in question here, even if made on political grounds, would not violate the First Amendment. ASCS State Executive Directors and FmHA State Directors are high-ranking officials of the Department of Agriculture. As discussed above (see pages 3-4, 7, 8-9, *supra*), they occupy positions at the GS-13 to GS-15 level, administer budgets of millions of dollars in each state, supervise a substantial state-wide staff of more than 100 persons, and act as public speakers and educators on the administration's programs. More important, these directors are, with regard to their respective programs, the chief federal official in each state. They "exercise considerable control over the implementation of the administration's agricultural program policies at the state and local level, and, thereby, insure either the success or failure of the programs. * * * The director thereby serve[s] as the administration's pipeline and advocate at the state and the local level" (Pet. App. 4a).[6] The officials in-

[6] As explained in *Elrod* v. *Burns*, *supra*, 427 U.S. at 368 (plurality opinion):

> An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals.

volved here thus stand in stark contrast to the sheriffs' employees discharged in *Elrod* and the assistant public defenders discharged in *Branti*. We believe the findings demonstrate that, even assuming the discharges in this case were based on political grounds, the Department did not violate the First Amendment standard of *Branti* (slip op. 11) and *Elrod* (427 U.S. at 368 (plurality opinion)).

In any event, even if the appropriate course would be to remand the case to the lower courts for reconsideration in light of *Branti* v. *Finkel* if the nature of the directors' responsibilities were the only issue presented, we believe that an additional consideration obviates any need for a remand here.

3. We submit that the findings of the courts below demonstrate that the discharges challenged in this case did not occur for impermissible political reasons.[7] The district court found, based on "uncontroverted" testimony, "that the Carter administration did not know in fact to which political party the incumbents belonged, nor did officials at the Department of Agriculture, at any time, suggest or coerce the incumbents to support the Democratic Party in return for retaining their jobs" (Pet. App. 6a).[8]

[7] The burden of proof on this issue rests upon the discharged employee. See *Branti* v. *Finkel, supra,* slip op. 9.

[8] The district court also noted that one of the discharged directors had been appointed by a previous Democratic administration (Pet. App. 6a).

Contrary to petitioner's assertion (Pet. 5), the district court did not find that these discharges occurred for political reasons. As the court of appeals pointed out (Pet. App. 34a-35a), the quoted comment of the district court, made orally during the course of a hearing, is inconsistent with the formal findings of fact and conclusions of law that were subsequently entered.

Thus, unlike in *Elrod* and *Branti*, these employees were not discharged "solely for the reason that they were not affiliated with or sponsored by the Democratic Party" (*Branti* v. *Finkel, supra,* slip op. 9, quoting *Elrod* v. *Burns, supra,* 427 U.S. at 350 (plurality opinion)).[9] Rather, as the court of appeals observed (Pet. App. 35a, quoting *id.* at 5a, 6a):

> There is evidence in the record that the purpose of [respondent's] personnel review was to spotlight incumbents "of such outstanding qualities that they should be retained" when most incumbents were being replaced "by individuals who supported the policies and programs of the new administration." * * *
>
> ← The district court did not find that the employees were dismissed solely for political reasons, and indeed cited parts of the record that point to a motivation of the Secretary to enhance policy formulation and execution.

Moreover, 35% of the non-veteran incumbent FmHA State Directors, and 15% of the non-veteran incum-

[9] The Court in *Elrod* v. *Burns* further explained that "[i]n order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives" (427 U.S. at 355 (plurality opinion)).

bent ASCS State Executive Directors, were continued in office by the new administration at the time petitioner's members were discharged (see page 5 & note 2, *supra*).

For these reasons, this case is of an altogether different stripe than *Elrod* v. *Burns* and *Branti* v. *Finkel*. No question is presented here of dismissals for reasons of political affiliation. Instead, employees were discharged if they were neither of outstanding quality nor in agreement with the policies and programs of the new administration. In our view, such personnel actions concerning these high-ranking positions do not raise a colorable claim of a First Amendment violation, for, as the Court recognized in *Branti* v. *Finkel*, *supra*, slip op. 13 n.14, "[t]o the extent that [respondent] lacks confidence in the assistants he has inherited from the prior administration for some reason other than their political affiliations, he is, of course, free to discharge them." In the circumstances of the present case, we believe that the discharges were justified by the governmental interest in the "loyalty of employees * * * to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Elrod* v. *Burns*, *supra*, 427 U.S. at 367 (plurality opinion).

In sum, since the uncontroverted evidence in the record discloses that the dismissals in this case were not based on impermissible political grounds, the threshold element of a First Amendment cause of

action has not been satisfied.[10] Because the Court's recent decision in *Branti* v. *Finkel* is addressed solely to the proper standard to be applied once it has been determined that a governmental employee has been discharged because of his political affiliation, that decision has no application here. Hence, it is unnecessary to vacate the judgment below and to remand for reconsideration in light of *Branti* v. *Finkel*.[11]

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[10] We also note that a new statute governing the federal civil service has been enacted since this litigation was initiated. See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S.C. (Supp. II) 1101 *et seq.* Among other things, the Act provides that, with respect to a "covered position" (5 U.S.C. (Supp. II) 2302(a)(2)(B)), no discrimination against an employee shall occur "on the basis of * * * political affiliation, as prohibited under any law, rule, or regulation." 5 U.S.C. (Supp. II) 2302(b)(1)(E); see also 5 U.S.C. (Supp. II) 2301(b)(2), 2301(b)(8), 2302(b)(3). In addition, the Act establishes a mechanism, under the direction of a Special Counsel whose position and independence are protected by statute, to investigate alleged violations of the Act and to bring disciplinary actions for such violations. 5 U.S.C. (Supp. II) 1204, 1206. The Act also recognizes an employee's right of appeal from adverse personnel actions to the Merit Systems Protection Board. 5 U.S.C. (Supp. II) 1205. Thus, should dismissals of the kind challenged herein arise in the future, they will be subject to administrative procedures under the Act to determine whether a covered position is involved, whether the discharge resulted from discrimination on the basis of political affiliation, and whether such action on grounds of political affiliation is prohibited by any law, rule, or regulation.

[11] *Delong* v. *United States*, No. 78-1847 (4th Cir. May 13, 1980), is not to the contrary. In *Delong*, the former FmHA State Director for Maine was reassigned and transferred to Washington, D.C., as part of the Department of Agriculture's

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1980

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review process following the change of administrations in 1977. In pertinent part, the court of appeals remanded the case to the district court for an analysis of the particular position at issue in light of *Branti* v. *Finkel* and for a determination whether the transfer and reassignment constituted, on the specific facts presented there, an unconstitutional burden upon protected First Amendment rights. The court in *Delong* did not address the question whether the transfer and reassignment in that case were based on impermissible political grounds—an inquiry that, in our view, is central to the proper disposition of the instant petition. In his concurrence in *Delong*, however, Judge Dumbauld noted that "the transfer complained of was merely a 'new broom' replacement of [*Delong*] by someone his superior felt he could work with more satisfactorily" (slip op. 17) and that "the new *Branti* criterion will be no more helpful to [*Delong*] than the *Elrod* test was" (*id.* at 18 n.5).

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